Office-Supreme Court, U.S.
FILED
OCT 7 1963
JOHN F. DAVIS, CLERK

No. 520

Supreme Court of the United States

OCTOBER TERM, A. D. 1963.

No. 19,577

**CONE BROTHERS CONTRACTING COMPANY;
TAMPA SAND & MATERIAL COMPANY;
FLORIDA PRESTRESSED CONCRETE CO., INC.,**
Petitioners,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

JOHN BACHELLER, JR.,
I. WALTER FISHER,
FISHER & PHILLIPS,
26 Pryor Street, N. E.,
Atlanta, Georgia,
Attorneys for Petitioners.

SUBJECT INDEX.

	Page
SUMMARY OF THE CASE	1
JURISDICTION	2
STATUTES INVOLVED	2
QUESTION PRESENTED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	10
APPENDICES:	
Appendix A—Opinion of the Court of Appeals	13
Appendix B—Decision of the National Labor Relations Board	24
Appendix C—Decree of the Court of Appeals	26
Appendix D—Amended Decree of the Court of Appeals	27
Appendix E—On Petition for Rehearing in the Court of Appeals	28

TABLE OF CASES CITED.

J. A. Bentley Lumber Co. v. NLRB, 180 F.2d 641 (5th Cir. 1950)	8
NLRB v. John S. Swift Co., 277 F.2d 641 (5th Cir. 1950)	8
NLRB v. Illinois Bell Telephone Co., 189 F.2d 124 (7th Cir. 1951), cert. denied 342 U.S. 885 (1951)	5, 6, 8, 9

TABLE OF CASES CITED—(Continued):

	Page
NLRB v. Montag Bros., 140 F.2d 730 (5th Cir. 1944)	8
NLRB v. Rockaway News Supply Co., 345 U.S. 71 (1953)	9
NLRB v. Rockaway News Supply Co., 197 F.2d 111 (2nd Cir. 1952)	9

TABLE OF STATUTES CITED.

Act of Cong. July 5, 1935, c. 372, Sec. 7 (49 Stat. 452); as amended June 23, 1947, c. 120, (61 Stat. 140), 29 U.S.C. § 157	2
Act of Cong. July 5, 1935, c. 372, Sec. 8 (49 Stat. 452); as amended June 23, 1947, c. 120 (61 Stat. 140); Oct. 22, 1951, c. 534 (65 Stat. 601); Sept. 14, 1959 Pub. L. 86-257, (73 Stat. 525, 542, 545) 29 U.S.C. § 158	3

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1963.

No. 19,577.

CONE BROTHERS CONTRACTING COMPANY;
TAMPA SAND & MATERIAL COMPANY;
FLORIDA PRESTRESSED CONCRETE CO., INC.,
Petitioners,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I. SUMMARY OF THE CASE.

This is a petition seeking review of the decision rendered by the United States Court of Appeals for the Fifth Circuit in the case of *National Labor Relations Board, Petitioner v. Cone Brothers Contracting Company,*

Tampa Sand & Material Company; Florida Prestressed Concrete Co., Inc., Respondents, as found in the official reporter volume 317 F.2d 3 (5th Cir. 1963). A copy of the opinion of the Court is appended hereto as Appendix "A"; a copy of the decision of the National Labor Relations Board is appended hereto as Appendix "B."

The Petition for Rehearing, filed by Respondents below, was denied June 29, 1963. The judgment or decree of the United States Court of Appeals for the Fifth Circuit ordering enforcement of the order of the National Labor Relations Board was entered on July 10, 1963. An amended judgment or decree was entered July 31, 1963.

II. JURISDICTION.

The Supreme Court of the United States has jurisdiction to grant review of the decision in this case for the following reasons: The Court of Appeals in this case has decided an important question of federal law which has not been, but should be, settled by this Court. The United States Court of Appeals for the Fifth Circuit rendered a decision in conflict with the decision of the United States Court of Appeals for the Seventh Circuit on the same matter. Jurisdiction is statutorily conferred by 28 U.S.C. § 1254(1).

III. STATUTES INVOLVED.

Section 7 of the Labor Management Relations Act, 1947, as amended [29 U.S.C. § 157] provides the following:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to

bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)."

Section 8(a) of the Labor Management Relations Act, 1947, as amended [29 U.S.C. Sec. 158(a)] provides, in part, as follows:

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."

IV. QUESTION PRESENTED.

The question presented is whether or not the discharge of an employee, who individually refuses to cross a picket line of a union, of which he is not a member, at his employer's place of business, constitutes an unfair labor practice violating Sections 8(a)(1) and (3) of the Labor Management Relations Act.

V. STATEMENT OF THE CASE.

The National Labor Relations Board petitioned the United States Court of Appeals for the Fifth Circuit

for enforcement of the Board's order for the employers here involved to cease and desist from discharging employees and to offer reinstatement and make whole three discriminatees, namely, Otto Mathis, Woodrow Wilson, and Wyman Davis. The Court of Appeals entered a decree enforcing the Board's order. This petition seeks review of the decision of the Court of Appeals.

Petitioner is composed of three companies, Cone Brothers Contracting Company; Tampa Sand & Material Company; and Florida Prestressed Concrete Co., Inc. These businesses are closely affilated in ownership, control, management and operation. The companies have separate locations, and each company has more than one location. The Board and Court treated the companies as a single employer. 317 F.2d at 5, Opinion of the Court, p. 2, Appendix A, p.p. 13-23. (R. 302-304, 296-297.)

The Local 925, International Union of Operating Engineers (hereinafter, the Engineers) was certified as bargaining representative of a unit of maintenance shop employees of Cone Brothers in June, 1959. In February, 1960, the Engineers began an organizational effort directed toward the remainder of Cone's employees and the Florida Prestressed Concrete Company employees. Also, in February, 1960, the Teamsters, Chauffeurs, Helpers Union No. 79 (hereinafter, the Teamsters) began an organizational campaign among the Tampa Sand employees (R. 293).

After reaching an impasse in contract negotiations, the Engineers called a strike on May 24, 1960, and

picketed the various locations of Cone Brothers and Prestressed (R. 396-397). On May 26, 1960, several ready-mix concrete trucks of Tampa Sand were dispatched to work at Prestressed. The interchange was customary (R. 2990, 2993). Three of the truck drivers, Mathis, Davis and Wilson, members of the Teamsters union (R. 1901, 1902), individually and at different times, refused to cross the Engineer's picket line at Prestressed. Mathis refused to go to work at Prestressed because he did not want to cross the picket line (R. 1510). Wilson and Davis would not cross the picket line because of fear of harm to themselves or their families (R. 1539, 1611). The employer, Tampa Sand, did not affirmatively discharge them, but "assumed" they had "quit". Even though the employer contended that these employees quit rather than being discharged, the Board held they were "constructively discharged". The Court of Appeals rejected the "constructive discharge" theory but held that the employees "lost their jobs" and that their "discharge" constituted an unfair labor practice in violation of Section 8(a)(1) and (3) of the Labor Management Relations Act.

VI. REASONS FOR GRANTING THE WRIT.

The decision of the United States Court of Appeals for the Fifth Circuit should be reviewed because it is in conflict with a decision rendered on parallel facts by the Court of Appeals for the Seventh Circuit, namely, *NLRB v. Illinois Bell Telephone Co.*, 189 F.2d 124 (7th Cir. 1951), *cert. denied* 342 U.S. 885 (1951).

The *Illinois Bell Telephone* case arose out of demotion of employees who refused to cross a picket line; the Board held the disciplinary action by the employer to be discriminatory and a violation of Section 8(a)(3). The Court of Appeals refused enforcement of the Board's order on the ground that the "discriminatees" were not engaged in protected concerted activity.

The facts of the *Illinois Bell* case are: The company rendered telephone services to the entire State of Illinois and a few areas outside the State. The employees of the company working in the Chicago area were represented by the Chicago Telephone Traffic Union; the employees outside Chicago were represented by Illinois Telephone Traffic Union. The Illinois Union commenced an economic strike and placed pickets at employer's locations throughout the State of Illinois and at some locations within Chicago. The employees in question worked in Chicago and were members of the unit represented by the Chicago Union (which was not on strike). As each individual discriminatee came to work, she saw the Illinois Union picket line and out of the belief in her duty to honor it, refused to cross and report to work. The company demoted each of the employees which resulted in the charges of discrimination. It should be noted that each discriminatee individually refused to cross a picket line of a union, of which she was not a member, at her own employer's place of business. The Court held:

> "There is no evidence that these eight employees acted in combination or concert. They did not con-

verse with each other or any other person regarding the activity in which they engaged; that is, a refusal to cross the picket line. The record discloses, unmistakably that each acted in her own individual capacity. . . . " 189 F.2d at 127.

Thus, under the Seventh Circuit's decision, there is no protection afforded by the Act for these activities not in concert. The Court also refused to treat the employees as "strikers", as follows:

> "The Trial Examiner in his findings, referring to the refusal of the involved employees to cross the picket line, stated: 'By so doing these eight employees placed themselves in the position of sympathy strikers who made common cause with those engaged in the economic strike against their common employer. As a result, their legal status became identically that of the striking employees of the ITTU State unit, namely, economic strikers'. We think this is a novel theory that the mere refusal to cross a picket line, in the absence of any other activity, makes the one who refuses a party to the strike, but even so, as already shown, such refusal was not for the 'mutual aid or protection' of the employees involved. It could have only been for the benefit and aid of those in a different bargaining unit, the representative of which could not have represented the involved employees, and consequently, could have obtained nothing from respondent for their benefit." 189 F.2d at 129.

The Seventh Circuit has, therefore, held that one who refuses to cross a picket line of a union, of which he is not a member, at his employer's place of business, is

not engaged in protected "concerted activity" nor does he attain the status of a "sympathy striker" since his action is for the benefit and aid of employees in another bargaining unit.

The facts in the instant case are parallel to those in the *Illinois Bell* case, namely, the discriminatee truck drivers were members of the Teamsters union as they were individually instructed, at varying times, to report for work at Prestressed (one of employer's locations), each driver, without communicating with the others, refused to cross the picket line of the Engineers union at Prestressed. The reasons given were: Mathis did not want to cross the picket line (presumably because he believed it to be his duty to honor it); and Wilson and Davis refused to cross the picket line because of fear of harm to themselves or their families. The picket line in question was of another union, the Engineers.

The rule of *Illinois Bell* should have been applied to the instant case; however, the Court of Appeals for the Fifth Circuit erroneously arrived at its conclusion by relying upon three cases previously decided by it. It is submitted that the conclusions there are inapplicable to the fact situation of this case. The decisions relied upon are distinguishable as follows: The dischargees in *J. A. Bentley Lumber Co. v. NLRB*, 180 F.2d 641 (5th Cir. 1950), refused to cross picket lines of a union of which they were members; this was held to be protected concerted activity. Similarly, in *NLRB v. John S. Swift Co.*, 277 F.2d 641 (5th Cir. 1950), the Court found "concerted activity" when the employees refused to cross picket lines of their own union. Further, *NLRB v. Montag Bros.*, 140 F.2d 730 (5th Cir. 1944), in-

volved employees who were discharged for refusing to cross a picket line established by a union of which they were members.

Petitioner respectfully asserts that the decision of the Court of Appeals for the Fifth Circuit in this case is in conflict with the *Illinois Bell* decision of the Seventh Circuit and that review should be granted to resolve this conflict.

An additional ground for issuance of a writ exists in this case. It should be observed that this Court has not decided the respective rights and duties of employers and employees where an employee honors a picket line. This Court in *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71 (1953), as noted by the Court of Appeals below, has "specifically declined the invitation (p. 75) to decide 'sweeping abstract principles as to the respective rights of employer and employee regarding picket lines.'"

The Court of Appeals for the Second Circuit in *NLRB v. Rockaway News Supply Co.*, 197 F.2d 111 (2nd Cir. 1952), announced the following right-duty relationship where an employee refused to cross a picket line at the premises of another employer:

> "In other words an employee is of course free to exercise his right to refuse to cross a picket line when he is on his own time and his discharge for doing so would doubtless be a violation of Section 8(a)(1). But he is not free to exercise the right during his working time in violation of his employer's working rules by refusing to perform that part of his regular duties which requires him to

> cross the picket line. To hold otherwise would be to permit an employee unilaterally to dictate the terms of his employment which it is well settled he may not do."

The Supreme Court, on certiorari, affirmed the decision without adopting the principle set forth above. It was held that the employee's refusal to cross the picket line was a violation of the no-strike clause of the collective bargaining contract covering the dischargee's employment.

Petitioner does not ask the Court to decide "sweeping abstract principles" here; it requests that review be granted in order that this Court may consider this important question of federal law and the rights and duties of employees and employers where an employee refuses to cross a picket line of a union of which he is not a member at his employer's place of business.

VII. CONCLUSION.

Petitioner respectfully requests, for the reasons set forth above, that this petition for writ of certiorari be granted and that the judgment of the United States Court of Appeals for the Fifth Circuit be reversed.

JOHN BACHELLER, JR.,
I. WALTER FISHER,
FISHER & PHILLIPS,
26 Pryor Street, N. E.,
Atlanta 3, Georgia,
Attorneys for Petitioners.

CERTIFICATE OF SERVICE.

Notice of filing of this Petition for Certiorari, together with copies hereof, have this date been served, according to the rules of this Court, by depositing same in the United States Mail, first class postage prepaid, upon the following:

Archibald Cox, Esquire,
Solicitor General,
Department of Justice,
Washington 25, D. C.,

Stuart Rothman, Esquire,
General Counsel,
National Labor Relations Board,
Washington 25, D. C.,

Dominick L. Manoli, Esquire
Associate General Counsel,
National Labor Relations Board,
Washington 25, D. C.,

Marcel Mallet-Prevost, Esquire,
Assistant General Counsel,
National Labor Relations Board,
Washington 25, D. C.

This ..... day of October, 1963.

JOHN BACHELLER, JR.,
I. WALTER FISHER,
FISHER & PHILLIPS,
26 Pryor Street, N. E.
Atlanta 3, Georgia,
Attorneys for Petitioners.

APPENDIX "A".

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19577

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

CONE BROTHERS CONTRACTING COMPANY; TAMPA SAND & MATERIAL COMPANY; FLORIDA PRESTRESSED CONCRETE CO., INC.,
Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D. C.

(May 8, 1963.)

Before TUTTLE, Chief Judge, WOODBURY,* Chief Judge, and BELL, Circuit Judge.

WOODBURY, Chief Judge:* The basic question raised by this petition for enforcement of an order of the National Labor Relations Board is whether the evidence in the record considered as a whole is sufficient to support the Board's decision that one of the respondents, Tampa Sand & Material Company, had violated § 8 (a) (1) and (3) of the National Labor Relations Act, as amended.

* Chief Judge, First Circuit, sitting by designation.

The three respondents are Florida corporations with headquarters in Tampa. Cone Brothers Contracting Company is engaged primarily in building streets, highways and bridges and in doing excavation work in Tampa and elsewhere in the State. Florida Prestressed Concrete Co., Inc., confines its operations to the manufacture of prestressed and precast cement products at a single plant located on the outskirts of Tampa. Tampa Sand & Material Company, with which we are primarily concerned in this proceeding, is engaged in the production and distribution of ready-mix concrete, concrete block, sand, shell and crushed stone. It has four locations in or on the periphery of Tampa called "batch bins," that is to say, plants from whch its concrete mixer trucks are loaded and dispatched. Its principal bin and main office is located in the city and is known as its "13th Street bin." Three other bins are strategically located on the outskirts of the city. Its Anderson Road bin is to the northwest, its bin at the juncture of Routes 301 and 60, called its 301-60 bin, is to the southeast and its Skipper Road bin is to the northeast.

The respondents concede that the three corporations are closely affiliated in ownership, control and management and do a substantial amount of business with one another. The *Board's finding* that they *constitute a single employer* within the meaning of the Act *goes unchallenged*. When appropriate they will be referred to hereinafter in the singular.

The Board's findings and order cover a wide range of unfair labor practices by Cone Brothers and Tampa

Sand. Pursuant to stipulation, however, we are concerned on this petition for enforcement with only the part of the order having to do with the Board's conclusion that Tampa Sand discharged three truck drivers in violation of § 8(a) (1) and (3) of the Act and that a strike which began the day after the discharges was in consequence thereof and hence an unfair labor practice strike warranting the Board's order to reinstate the strikers with back pay.

The respondent was having labor troubles early in 1960. There was unrest among its employees, some of whom wanted to unionize and some of whom did not, and its managerial and supervisory employees in one way or another exhibited no little anti-union animus. The record is clear as to this. No more need be said by way of background.[1]

The events with which we are here directly concerned took place toward the end of May, 1960. On May 24 the Board, acting on a representation petition filed in March by Teamsters, Chauffeurs, Helpers Local Union

[1] The respondent moved to strike that portion of the Board's brief in which under the heading "Background" it recounted the labor troubles of Cone Brothers and Tampa Sand, which, it said, were eliminated from the case by the stipulation, were not conceded and "incorrectly and prejudiciously represented Respondent's position." The material in the Board's brief to which the respondent objects summarizes the findings of the trial examiner adopted by the Board. Having agreed that, apart from the excepted findings, the Board's order "is valid and proper," the validity of the findings on which those parts of the order rest is at least inferentially conceded. The respondent does not need to fear that the collective mind of the court will be poisoned by statements of factual background in the Board's brief. We shall decide this case on the material printed in the record. The respondent's motion is denied.

No. 79, ordered a representation election on June 7 by a unit of Tampa Sand's employees including its truck drivers. And on the same day, May 24, employees of Cone Brothers and Florida Prestressed went out on strike under the leadership of Local 925, International Union of Operating Engineers, AFL-CIO, which was the Board-certified bargaining representative of Cone Brothers' maintenance employees and was conducting a campaign to organize other employees of Cone Brothers and the employees of Florida Prestressed. The Board found that there can be no doubt that picket lines were established at the premises of these two employers. But there is no direct finding as to whether or not the premises of Tampa Sand were also picketed and the evidence one way or the other is conflicting: A witness for the respondent said all of Tampa Sand's premises were picketed on May 24, but the Board witnesses said only that pickets in front of Cone Brothers' premises adjoining Tampa Sand's 13th Street and 301-60 bins occasionally wandered by those bins on that day and the day following. At any rate, Tampa Sand employees apparently worked as usual on May 24 and 25.

On the afternoon of May 25 Tampa Sand's general manager called the dispatcher on duty at the 13th Street bin and ordered a truck driver working out of that location named Stringfellow, who was active on behalf of the Teamsters Union, to report with his truck the first thing next morning for work at Florida Prestressed. It was routine for Tampa Sand's general manager to direct the dispatcher at the 13th Street bin to assign trucks to work at Florida Prestressed. Tampa

Sand's trucks were often assigned to such work and all orders for the delivery of ready-mix concrete were customarily handled by the dispatcher on duty at the central 13th Street bin. It was unusual, however, for the general manager to specify a particular driver for specific work. Ordinarily the dispatcher at the 13th Street bin selected the driver for each delivery as ordered on the basis of the suitability of the equipment on hand for the job to be done and picked the bin from which delivery was to be made on the basis of the availability of the bin to the place of delivery.

Evidently the particularity of the general manager's order aroused the dispatcher's suspicion (there were two on duty early the next morning when Stringfellow reported for work), for they told Stringfellow that they were ordered to send him to Florida Prestressed and then, having been told by Stringfellow that he would not cross the picket line there, faked a telephone message calling Stringfellow home to meet a fictional family emergency. Stringfellow having punched out and left, one of the 13th Street dispatchers called the dispatcher at the Skipper Road bin, which was nearer the Florida Prestressed plant, to send a truck to fill the general manager's order. The Skipper Road dispatcher said he had heard of "the little deal" and had already sent driver Otho Mathis to Florida Prestressed. Believing from this that the general manager had ordered two trucks to Florida Prestressed, one from Skipper Road and the other from 13th Street, the dispatchers at the latter location, in order to fill the general manager's order, sent one of their own drivers

named Coppola, who, they thought correctly, would not hesitate to cross the picket line. Coppola worked all day at Florida Prestressed.

Mathis from the Skipper Road bin went to Florida Prestressed as ordered but refused to drive his truck through the picket line. He reported his refusal back to his dispatcher at Skipper Road and the dispatcher told him to "stand by," which he did while someone else drove his truck into the Florida Prestressed plant. Later he returned to his Skipper Road station where he was told that his time had been stopped at the general manager's order as of the time he reported his refusal to cross the picket line. In the meantime the general manager ordered another truck sent from Skipper Road to Florida Prestressed and the dispatcher sent driver Wilson. Wilson also refused to cross the picket line, he said for fear of bodily harm to himself and his family, and later the general manager told Wilson that he had "quit" and ordered his time card clocked out. Also in the meantime the general manager had called the dispatcher on duty at 13th Street to inquire why Stringfellow had not gone to Florida Prestressed. When the general manager was told that Stringfellow had received an emergency call to go home, the general manager, evidently suspicious, asked whether Stringfellow got the call before or after he was given his assignment, and the dispatcher falsely answered before. The dispatchers agreed that as union sympathizers the purpose of their subterfuge had been to save Stringfellow his job. Both of them joined the Teamsters Union the same day, May 26.

Also during the morning of May 26 the general manager called the dispatcher at 13th Street for the names and telephone numbers of drivers on lay-off status. He was given the names of several, one of whom, Davis, a known union adherent, he called on the phone and asked to return to work. Davis agreed to report for work at 13th Street at noon but during the morning went to Florida Prestressed where he saw the picket line. When he reported for work the general manager told him he was to work at Florida Prestressed, and when he refused to cross the picket line there the general manager told him that he had refused to work or refused the job, and Davis left.

The Teamsters Union called a meeting of Tampa Sand employees for the evening of May 26, the notice of which read:

> "A strike vote will be taken because the Company is now firing our people because of their belief in not crossing a picket line. Therefore, we must stand together and not be picked off one at a time."

The matter stated in the notice was discussed at the meeting with particular reference to the day's events involving drivers Mathis, Wilson and Davis, and a strike was voted 45 to 1. The following day, May 27, pickets appeared at Tampa Sand's locations bearing the legend "UNFAIR LABOR PRACTICES." Nevertheless Tampa Sand continued to operate in spite of a high turnover rate of employees hired to fill the vacancies caused by the strike.

On the basis of the facts briefly outlined above, the Board, affirming the trial examiner, found that Tampa Sand, because of the known union sympathies of Mathis, Wilson and Davis, had "engaged in a scheme" of putting them in a position of either crossing the picket line at Florida Prestressed or "being placed in a 'quit' status," and, when they refused to cross the picket line, terminating their employment. The Board said that it agreed with the trial examiner that Tampa Sand had thereby "constructively discharged" the three drivers for the purpose of discouraging union membership in violation of § 8(a) (1) and (3) of the Act. And it said: "Moreover, we find that even in the absence of such scheme the discharge of these employees for engaging in the protected activity of concertedly refusing to cross the picket line violated Sections 8(a) (3) and (1) of the Act."

The concept embodied in the term "constructive discharge" is too vague and uncertain in meaning to be helpful. The long and the short of the matter is that Mathis and Wilson lost their jobs and Davis was not rehired, which, in the context of this case as will presently appear, amounts to the same thing. *Phelps Dodge Corp. v. NLRB*, 313 U. S. 177 (1941). The fact that the men were discharged[2] by roundabout means and circumlocution, telling them that they had "quit," avails the employer nothing. The question is whether their discharges constituted an unfair labor practice. This court in *NLRB v. Montag Bros., Inc.*, 140 F. 2d 730 (C. A. 5, 1944), and it would seem also in *J. A. Bentley*

[2] For simplicity of statement we can refer to Davis as a dischargee.

Lumber Co. v. NLRB, 180 F. 2d 641 (C. A. 5, 1959), held, but without analysis or discussion, that it was an unfair labor practice for an employer to discharge an employee for refusing to cross a picket line in the course of his work. The Court of Appeals for the Second Circuit, however, in *NLRB v. Rockaway News Supply Co.*, 197 F. 2d 111 (C. A. 2, 1952), one judge dissenting, took a different view. In considering the question whether an employer violated § 8(a) (1) and (3) of the Act by discharging an employee because of his refusal to cross a picket line at the premises of another employer which his duties required him to enter, the court said (pp. 113-114):

> "In other words an employee is of course free to exercise his right to refuse to cross a picket line when he is on his own time and his discharge for doing so would doubtless be a violation of Section 8(a) (1). But he is not free to exercise the right during his working time in violation of his employer's working rules by refusing to perform that part of his regular duties which requires him to cross the picket line. To hold otherwise would be to permit an employee unilaterally to dictate the terms of his employment which it is well settled he may not do."

On certiorari the Supreme Court affirmed, *NLRB v. Rockaway News Supply Co.*, 345 U. S. 71 (1953). But it did not do so on the reasoning of the Court of Appeals but on the basis of its interpretation of an applicable collective bargaining agreement. Indeed, the Court

specifically declined the invitation (p. 75) to decide "sweeping abstract principles as to the respective rights of employer and employee regarding picket lines." Highest authority, therefore, leaves the question before us open.

The facts in the *Rockaway News* case differ from the facts in the case at bar in that in *Rockaway News*, as both the Court of Appeals and the Supreme Court were careful to point out, there was no evidence of anti-union animus on the part of the respondent-employer, or anything to indicate that the employee's discharge was intended to or did in fact discriminate against him as a union man or was designed to discourage membership in a labor organization. The facts in the case at bar are quite otherwise, however; for here there is ample evidence of the respondent's strong anti-union bias and prejudice, and there is also ample evidence to indicate that the drivers involved were selected because of the respondent's belief that as union adherents they would show the union man's well known respect for and deep-seated reluctance to cross picket lines, and refuse to do so, thereby giving an excuse to discharge them and thus eliminate votes for the union in the pending representation election. Moreover, while we recognize the respondent's right to attempt to run its business in spite of the sympathetic activities of its drivers, we find no evidence in this case that such was the fact, that is, that the respondent in doing what it did acted only to preserve the efficient operation of its business. For all that appears in the record, other drivers were on duty and available who, like driver Coppola, would

have no compunction about crossing the picket line of Florida Prestressed.

In short, we think that when it appears that a discharge of an employee for refusing to cross a picket line is resorted to out of anti-union animus to get rid of a union sympathizer and not to preserve the efficient operation of an employer's business, an unfair labor practice in violation of § 8(a) (1) and (3) occurs. See *NLRB v. Montag Bros., Inc.*, 140 F. 2d 730 (C. A. 5, 1944), and perhaps *J. A. Bentley Lumber Co. v. NLRB*, 180 F. 2d 641 (C. A. 5, 1950). See also *NLRB v. John S. Swift Company*, 277 F. 2d 641, 646 (C. A. 7, 1960).

Since it is quite clear that the strike of Tampa Sand's employees of May 27 was voted and called because of the unfair labor practices of the respondent the day before in discharging the three drivers, it follows that the strike was one for unfair labor practices and that therefore under the established rule the strikers as well as the three drivers are entitled to reinstatement with back pay.

A decree will be entered enforcing the order of the Board.

APPENDIX "B".

135 NLRB No. 18

D 2272
Tampa, Fla.

DECISION AND ORDER.

(Number and Title Omitted.)

On May 26, 1961, Trial Examiner George A. Downing issued his Intermediate Report in the above-entitled proceeding finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that Respondents had not engaged in certain other unfair labor practices. Thereafter, the General Counsel and Respondent Tampa Sand & Material Company filed exceptions to the Intermediate Report and supporting briefs.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are affirmed. The Board has considered the Intermediate Report, the ex-

[1] The Respondent's request for oral argument is hereby denied as the record, including the exceptions and briefs, adequately present the issues and positions of the parties.

ceptions and briefs, and the entire record in these cases, and hereby adopts the findings, conclusions and recommendations of the Trial Examiner with the modifications noted below.

The record demonstrates, as found by the Trial Examiner, that because of their known union sympathies, Respondent Tampa Sand & Material Company engaged in a scheme of placing employees Mathis, Wilson and Davis in the position of either crossing the picket line established at the premises of the other Respondent Employers, or being placed in a "quit" status. When Mathis, Wilson and Davis did in fact refuse to cross the picket line, they were terminated by being placed in a "quit" status by Respondent Tampa. We agree with the Trial Examiner that Respondent Tampa thereby constructively discharged these employees for the purpose of discouraging union membership, in violation of Section 8(a)(3) and (1) of the Act. Moreover, we find that even in the absence of such scheme the discharge of these employees for engaging in the protected activity of concertedly refusing to cross the picket line violated Sections 8(a)(3) and (1) of the Act.[2]

[2] The Trial Examiner found that the subsequent strike against Respondent Tampa Sand & Material Company was in protest over the discharges of Mathis, Wilson and Davis, and was therefore an unfair labor practice strike. However, the Trial Examiner's recommended order does not provide for the reinstatement of the unfair labor practice strikers. We agree with the unfair labor practice strike finding, and shall modify the recommended order to provide for the reinstatement of the strikers upon application, in accordance with our usual practice in such cases.

APPENDIX "C".

(Number and Title Omitted.)

DECREE.

Before TUTTLE, Chief Judge, WOODBURY,* Chief Judge, and BELL, Circuit Judge.

By the Court: THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for enforcement of a certain order issued by it against Cone Brothers Contracting Company and Tampa Sand and Material Company on January 10, 1962. The Court heard argument of respective counsel on February 25, 1963, and has considered the briefs and transcripts of record filed in this cause. On May 8, 1963, the Court, being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged, and decreed by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced and that Respondent Cone Brothers Contracting Company, its officers, agents, successors and assigns, and Respondent Tampa Sand and Material Company, its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

Entered: July 10, 1963.

---

* Chief Judge of the First Circuit, sitting by designation.

APPENDIX "D".

(Number and Title Omitted.)

AMENDED DECREE.

Before TUTTLE, Chief Judge, WOODBURY,* Chief Judge, and BELL, Circuit Judge.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for enforcement of a certain order issued by it on January 10, 1962 in the above matter. The Court heard argument of respective counsel on February 25, 1963, and has considered the briefs and transcripts of record filed in this cause. On May 8, 1963, the Court, being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged, and decree by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced and that Respondent Cone Brothers Contracting Company, its officers, agents, successors and assigns, Respondent Tampa Sand and Material Company, its officers, agents, successors and assigns, and Respondent Florida Prestressed Concrete Co., Inc. abide by and perform the directions of the Board in said order contained.

Entered: July 31, 1963.

---

* Chief Judge of the First Circuit, sitting by designation.

APPENDIX "E".

January 29, 1963.

(Number and Title Omitted.)

ON PETITION FOR REHEARING.

Before TUTTLE, Chief Judge, WOODBURY,* Chief Judge, and BELL, Circuit Judge.

PER CURIAM: It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

---

* Chief Judge of the First Circuit, sitting by designation.